UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11559-GAO

BUNGE OILS, INC., f/k/a BUNGE FOODS CORPORATION,
Plaintiff and Counterclaim Defendant

v.

M&F MARKETING DEVELOPMENT, LLC,
Defendant and Counterclaim Plaintiff

MEMORANDUM AND ORDER
March 15, 2005

O'TOOLE, D.J.

For the reasons set forth below, the plaintiff's motion to dismiss the defendant's counterclaims (No. 27) is granted in part and denied in part.

As a preliminary matter, while my prior Memorandum and Order dated December 18, 2003, (No. 14) was ultimately directed at resolving the issue of arbitrability, the underlying construction of the terms of the Assignment and Assumption Agreement ("Assumption Agreement") between Au Bon Pain Co., Inc. ("ABP") and Bunge Foods Corporation ("Bunge") and the Marketing Development Agreement ("ABP Agreement") between M&F Marketing Development, LLC ("M&F") and ABP is now the law of this case. As set forth in the prior memorandum, Bunge's obligations to perform under the ABP Agreement "are limited to all obligations with respect to the supply of Approved Branded Baked Goods." Assumption Agreement, at ¶ 3. Bunge brand products are not "Approved Branded Baked Goods" as that term is defined in the Assumption Agreement. Bunge, therefore, is not obligated to pay commissions to M&F for the sale of Bunge brand products based on the terms appearing on the face of the written ABP Agreement as assumed by Bunge

pursuant to the Assumption Agreement. To the extent that any of M&F's counterclaims are premised upon the existence of such obligation, those claims are dismissed pursuant to Fed. R. Civ. P. 12(b)(6). That conclusion, however, does not completely dispose of any of M&F's counterclaims because those claims are also premised on alternative theories, some of which survive Bunge's motion to dismiss.

M&F has adequately set forth a counterclaim for breach of contract (counterclaim one). M&F has alleged that Bunge had a contractual obligation to pay commissions for the sale of Bunge brand products arising from certain oral representations said to have been made by Bunge's representatives and/or in the course of dealings between the parties over the five-year period from March 1998 to April 2003. As alleged in M&F's counterclaims, Bunge's representatives represented to M&F that it was not necessary to execute a separate broker agreement because the ABP Agreement already governed the parties' business relationship. At the time those representations were made (i.e., early 2001), M&F was, and had been, providing brokerage services with respect to Bunge brand products. As further alleged, the parties' conduct from 1998 through April 2003 was consistent with the representation that their relationship with respect to Bunge brand products was governed by the ABP Agreement. Those allegations provide a sufficient foundation, at least at this stage, for M&F's pleading that Bunge breached a contract when it refused to pay M&F commissions for the sale of Bunge brand products. See, e.g., Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc., – F.3d –, Nos. 03-1682, 1683, 1725, 2005 WL 388267, at *9 (1st Cir. Feb. 18, 2005) (an implied-in-fact contract may arise from the actions of the parties); First Pa. Mortgage Trust v. Dorchester Savs. Bank, 481 N.E.2d 1132, 1138-39 (Mass. 1985) (a written contract, even one requiring prior written consent to any modifications, may be modified by a subsequent oral agreement; "[m]utual agreement on modification of the requirement of a writing may,

moreover, 'be inferred from the conduct of the parties and from the attendant circumstances'") (citation omitted).

Likewise, the allegations concerning the oral representations and course of dealings provide a sufficient foundation for counterclaims two, three, five, and eight.

Counterclaim two alleges a violation of the implied covenant of good faith and fair dealing. "The covenant of good faith and fair dealing is implied in every contract." Uno Restaurants., Inc. v. Boston Kenmore Realty Corp., 805 N.E.2d 957, 964 (Mass. 2004). "[T]he purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." Id. The covenant is violated when a party's conduct, lacking good faith, "injures the rights of another to reap the benefits prescribed by the terms of the contract." Id. M&F's allegations concerning Bunge's conduct and failure to perform under the terms of the contract described above are adequate to support its counterclaim for violation of the covenant of good faith and fair dealing that is implied in that contract.

Counterclaim three alleges a violation of Mass. Gen. Laws. ch. 104, §§ 7-9, which provide a cause of action for the failure to timely pay commissions to sales representatives due under a contract. M&F has alleged the existence of a contract (as described above), that Bunge failed to properly terminate the contract, and that if Bunge did properly terminate the contract, commissions remained due and unpaid after the termination of the contract. Nothing more is needed to defeat Bunge's motion to dismiss this counterclaim. For purposes of the motion to dismiss, I am not bound to recognize Bunge's arguments that it "unambiguously terminated the parties' relationship by letter dated April 18, 2003" and thus that no commissions were due on sales effected after that date. Those issues remain in dispute and will not be resolved at the motion to dismiss stage.

Counterclaims five and six, respectively, set forth claims for unjust enrichment and quantum meruit. Unjust enrichment is an equitable remedy sometimes employed when contract-based remedies prove inadequate. See Massachusetts Eye and Ear Infirmary, 2005 WL 388267, at *11. The First Circuit has stated,

> [a quantum meruit claim] is a quasi-contract claim which . . . is a close cousin to the equitable remedy of unjust enrichment. Historically, the claim allowed a party to collect for the value of services or supplies furnished to another, based on an implied (at law) promise to pay, even though all of the requisites of a formal contract might not be present.

Commercial Assocs. v. Tilcon Gammino, Inc., 998 F.2d 1092, 1100-01 (1st Cir. 1993) (citation omitted)(emphasis in original). The Massachusetts Supreme Judicial Court, however, has stated,

> **Quantum meruit** is a theory of *recovery*, not a cause of action. It is a claim independent of an assertion for damages under the **contract**, although both claims have as a common basis the **contract** itself. Recovery under this theory is derived from the principles of equity and fairness and is allowed where there is substantial performance but not full completion of the **contract**. In a case involving an unenforceable **contract**, we allowed **quantum meruit** recovery, basing our reasoning on the theory of **unjust** enrichment. A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

J.A. Sullivan Corp. v. Commonwealth, 494 N.E.2d 374, 377 (Mass. 1986) (citations and internal quotation marks omitted)(emphasis in original).

Applying these principles here, I find that M&F has adequately pled its counterclaim for unjust enrichment. It has at its core the same allegations that support the contract-based claims (described previously) but states an alternative equitable theory of recovery if the contract claims prove insufficient. Further, I conclude that counterclaim six should be dismissed because quantum meruit, under Massachusetts law, is not a separate cause of action. Nevertheless, the theory of quantum meruit will remain in the case as a measure of recovery, if necessary, on the unjust enrichment claim.

Counterclaim eight also survives the motion to dismiss. It seeks a declaratory judgment concerning M&F's contract-based claims and in most respects is the mirror image of count two of Bunge's amended complaint.

Counterclaims four and seven, however, shall be dismissed. Counterclaim seven purports to set forth a claim for misrepresentation, stemming from Bunge's alleged representations that the ABP Agreement would apply to the sale of Bunge brand products. The First Circuit has stated,

> To prevail on a claim of fraudulent misrepresentation under Massachusetts law, the plaintiff must show that the defendant 'made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff reasonably relied upon the representation as true and acted upon it to his damage.'

Eureka Broadband Corp. v. Wentworth Leasing Corp., – F.3d – , 04-1577, 2005 WL 518860, at *5 (1st Cir. March 7, 2005) (quoting Russell v. Cooley Dickinson Hosp., 772 N.E.2d 1054, 1066 (Mass. 2002)). M&F has failed to allege, even in conclusory terms, that the representations were false at the time they were made and that they were made with knowledge of their falsity. See Massachusetts Eye and Ear Infirmary, 2005 WL 388267, at *10 (plaintiff alleged that defendant falsely represented that plaintiff would be compensated for its role in developing patented invention; summary judgment affirmed where plaintiff failed to "show that [defendant] did not intend to comply with the[] representations at the time they were made").

Counterclaim four alleges a violation of Mass. Gen. Laws ch. 93A and also fails. M&F's opposition to the motion to dismiss suggests that the Chapter 93A claim is based on Bunge's "willful bad acts" and "knowing misrepresentations." Those conclusory statements, however, find no support in the allegations of the counterclaims. Rather, even a generous reading of M&F's allegations reveals that this case is about little more than a dispute over money allegedly owed and the related breach

of an alleged contract. The Chapter 93A claim, like the misrepresentation claim, is merely piled on and cannot survive the motion to dismiss. See Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 40 (1st Cir. 2000) ("A mere breach of contract does not constitute an unfair or deceptive trade practice under 93A unless it rises to the level of 'commercial extortion' or a similar degree of culpable conduct.") (citations omitted).

Accordingly, Bunge's motion to dismiss (No. 27) is granted with respect to counterclaims four, six, and seven and denied with respect to counterclaims one, two, three, five, and eight.

It is SO ORDERED.

March 15, 2005
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE